

Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?

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I. INTRODUCTION

In his recent article, James Lawrence introduced many of us to an emerging form of appropriate dispute resolution—collaborative lawyering.¹ The collaborative law approach uses attorneys in a nonadversarial capacity to negotiate with the parties to achieve settlement.² Collaborative law's

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¹ James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431, 431–32 (2002). The origins of collaborative law can be traced to Stuart Webb, a Minnesota family law practitioner who, in 1990, rejected the adversarial nature of his practice and began experimenting with other trusted lawyers to achieve settlements in family law cases through nonadversarial collaboration with the parties. Douglas C. Reynolds & Doris F. Tennant, *Collaborative Law—An Emerging Practice*, BOSTON B.J., Nov./Dec. 2001, at 12. While collaborative law has proven most successful in the family law context, it has recently spread to all types of disputes. See Robert W. Rack, Jr., *Settle or Withdraw: Collaborative Lawyering Provides Incentive to Avoid Costly Litigation*, DISP. RESOL. MAG., Summer 1998, at 9, 10 (noting that family lawyers have taken the collaborative law lead, but recognizing emerging groups in environmental, personal injury, employment, and corporation law). As of 2001, collaborative law groups now exist in at least 20 states. Reynolds & Tennant, *supra*, at 12 n.6. Texas has recently given statutory recognition to collaborative law. See TEX. FAM. CODE ANN. §§ 6.603 (authorizing the use of collaborative law in marriage dissolution), 153.0072 (permitting the use of collaborative law in suits affecting parent-child relationships) (Vernon 2002). Specific courts have also explicitly authorized use of collaborative law. See HAMILTON COUNTY CT. C. P. R. 43 (authorizing collaborative law by local rule in an Ohio court).

² Lawrence, *supra* note 1, at 432 (describing the collaborative law process); see Tom Arnold, *Collaborative Dispute Resolution: An Idea Whose Time Has Come*, at <http://www.mediate.com/articles/arnold.cfm> (last visited Nov. 19, 2002) (describing collaborative law as when “the parties agree to scrap the idea of the adversarial system of law, and to work at every phase of their dispute resolution process in a collaborative, cooperative mode to resolve the dispute”); Chip Rose, *Principles and Guidelines for the Practice of Collaborative Law*, at <http://www.mediate.com/articles/rose1.cfm> (last visited Nov. 19, 2002) (describing the nonadversarial collaborative law process in the

unique twist is that counsel participates solely for settlement purposes, thereby increasing the stakes for participants in reaching agreement and diluting the litigation threat.³ Because the collaborative lawyer's "responsibilities shift away from those associated with 'pure' advocacy and toward the creative, flexible representation that characterizes neutrality,"⁴ Lawrence contends that the collaborative lawyer falls in a "unique ethical position" somewhere between the ethical posture of a traditional advocate and a neutral.⁵

Judge Sandra Beckwith and practitioner Sherri Goren Slovin flatly disagree.⁶ Describing Lawrence's approach as an "unduly complicated starting point,"⁷ Beckwith and Slovin reject the premise that "the collaborative lawyer wears a third hat, distinct from the traditional lawyer's and the neutral's."⁸ Rather, the collaborative lawyer's ethical responsibilities "lie at the advocacy extreme."⁹ According to Beckwith and Slovin, "[t]he collaborative lawyer has not taken off his advocacy hat or donned the hat of neutrality."¹⁰

What gives rise to this sharp split in ethical perspective by these ADR proponents well steeped in the collaborative law process?¹¹ An answer lies

context of family law); Collaborative Law Institute, *What is Collaborative Law?*, at <http://www.collaborativelaw.org/whatis.html> (last visited Nov. 20, 2002) (defining collaborative law as "resolving conflict using cooperative strategies rather than adversarial techniques and litigation").

³ Lawrence, *supra* note 1, at 432 (describing the limitation on counsel who are participating for settlement purposes only and the corresponding increased incentive to achieve settlement).

⁴ *Id.* at 442.

⁵ *Id.* at 439.

⁶ See Sandra S. Beckwith & Sherri Goren Slovin, *The Collaborative Lawyer as Advocate: A Response*, 18 OHIO ST. J. ON DISP. RESOL. 497, 498 (2003).

⁷ *Id.* at 502.

⁸ *Id.* at 498. Beckwith & Slovin similarly reject the notion that the collaborative lawyer wears both hats simultaneously. *Id.*

⁹ *Id.* at 501.

¹⁰ *Id.* at 503.

¹¹ Both Lawrence and Beckwith serve on the Board of Trustees of The Collaborative Law Center in Cincinnati, Ohio. Lawrence, *supra* note 1, at 431; Beckwith & Slovin, *supra* note 6, at 469 n.1. Slovin chairs the Collaborative Law Center's Family Section. *Id.* at 469 n.2. The Cincinnati group is recognized as leading the expansion of collaborative lawyering to practice areas outside of family law. Tom Arnold, *Collaborative Dispute Resolution—An Idea Whose Time Has Come?*, in ALI-ABA

in placing their disagreement within the context of the larger on-going conversation on the merits of different ethical guidelines for ADR participants. Beckwith and Slovin are correct in that currently a lawyer's conduct in a collaborative law settlement might be evaluated against the ethical standards embodied in a specific jurisdiction's ethical code, typically one based on the ABA's Model Rules of Professional Conduct.¹² The Model Rules certainly contemplate that as an "advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."¹³ While the process of collaborative lawyering could certainly be forced into this ethical scheme, should it be? Beckwith and Slovin's view is that it should. Lawrence, however, recognizes the difficulty in shackling a new cooperative paradigm to existing ethical rules that were forged and fitted to the adversarial system.¹⁴ Hence, the Lawrence-Beckwith/Slovin exchange is really part of a broader debate: should ADR have its own ethical rules? The on-going discussions concerning the proper ethical treatment of third-party neutrals, party-appointed arbitrators, and party representatives in mediation provide guidance. The central lesson from these dialogues is that separate

Course of Study Materials: ALTERNATIVE DISPUTE RESOLUTION: HOW TO USE IT TO YOUR ADVANTAGE 379, 389 (Oct. 2000).

¹² Forty-two states and the District of Columbia have rules based upon the Model Rules. Georgia is the most recent convert, adopting new rules based on the Model Rules effective January 1, 2001. Only a handful of states (Iowa, Maine, Nebraska, New York, Ohio, Oregon, and Tennessee) retain professional rules based on the older Model Code of Professional Responsibility [hereinafter Model Code]. However, New York and Oregon have incorporated some Model Rules provisions into their respective codes. See ABA/BNA LAW. MANUAL ON PROF'L CONDUCT, 01:3-01:4 (2002). California's unique rules follow neither the Model Code nor Model Rules. *Id.*

While there is a wide array of rules adopted by the federal district courts, ethical codes based on the Model Rules predominate:

Forty-eight districts . . . have adopted state court rules based on [the Model Rules]; twelve districts adopted state rules based [on the Model Code]; ten districts have adopted the ABA's Model Code or Model Rules directly and not their respective state's amended version; ten districts have adopted simultaneously both an ABA model and their own state's rules; eleven districts have not adopted any rule, although some of those districts have confusing standing orders about the district's policy.

Andrew L. Kaufman, *Who Should Make the Rules Governing Conduct of Lawyers in Federal Matters*, 75 TUL. L. REV. 149, 150 (2000).

¹³ MODEL RULES OF PROF'L CONDUCT pmbl. para. 2 (2002).

¹⁴ See Lawrence, *supra* note 1, at 438-42 (comparing the ethical orientation of the collaborative lawyer with that of a traditional advocate and neutral). Lawrence, however, stops short of advocating a separate ethical code for collaborative lawyers.

treatment may be warranted. While I risk becoming an ethical milliner,¹⁵ why should we put old ethical hats on the new heads embracing the collaborative paradigm? We should not.

II. LESSONS FROM OTHER ADR ETHICS DIALOGUES

A. *The Model Rules and the Third-Party Neutral Experience*

The questions of where on the ethical spectrum attorneys practicing ADR properly fit and whether separate ethical guidelines should control their conduct are certainly not new. Since the promulgation of the Model Rules in 1983, both the use and acceptance of ADR have rapidly expanded.¹⁶ However, when the Model Rules were drafted, even the two most prevalent forms of ADR, arbitration and mediation,¹⁷ were essentially unknown outside of a few narrow practice sectors.¹⁸ Not surprisingly, the Model Rules as drafted provided little guidance to lawyers participating in

¹⁵ I would much prefer being an ethical vintner, but Professor Kimberlee Kovach already cornered that market. See Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935, 935 (2001) [hereinafter *New Wine*] (titling her piece appropriately). Because Beckwith and Slovin introduce the hat analogy, I will stick with that. On a lighter note: "What did the hat rack say to the hat? You go on a head, and I'll stay right here." Telephone Interview with Laura J. Fairman, Wife, Austin, Tx. (Oct. 8, 2002) (following revelation of this Comment's title).

¹⁶ See Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 210-11 (2001) (highlighting the explosion of ADR use and acceptance, especially court-connected programs, since the mid-1970s); Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 832-33 (1998) (noting the current participation in and acceptance of mediation despite its rare use only twenty years ago).

¹⁷ Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 691 (2001) ("Mediation is now the preferred method of 'alternative dispute resolution' . . ."); Joseph B. Stulberg, *Mediation: The Rule, Not the Exception*, EXPERIENCE, Spr. 2002, at 38, 38 (describing mediation as a "significant component" of our judicial system).

¹⁸ Yarn, *supra* note 16, at 212 (describing arbitration and mediation as "barely on the legal ethics radar screen" except for specific commercial sectors, labor, and neighborhood or domestic disputes when the Model Rules were adopted).

ADR.¹⁹ Instead, they reflected the then dominant paradigm: lawyers are advocates in an adversarial system.²⁰

This orientation proved problematic for attorney third-party neutrals who, representing no one in particular, still operated under the rubric of the Model Rules.²¹ Commentators in the ADR field repeatedly pointed out this and other deficiencies in the state ethical codes as applied to appropriate dispute resolution.²² Professional organizations and ADR providers tried to

¹⁹ See *id.* (noting dearth of direction from current ethics regimes); see also *infra* note 22.

²⁰ See Yarn, *supra* note 16, at 212 (“[T]he Model Rules reflected the common conceptual paradigm of the lawyer as advocate in an adversary adjudicative system of dispute resolution.”).

²¹ See *id.* (“This [adversarial] orientation in the Model Code and Model Rules has caused considerable confusion when considering the actions of lawyer-neutrals who do not represent anyone.”); John D. Feerick, *Standards of Conduct for Mediators*, JUDICATURE, May–June 1996, at 317 (“[T]o what extent a lawyer-mediator is subject to the Model Rules of Professional Conduct is unclear . . .”). For example, former Rule 2.2 dealing with a lawyer acting as an intermediary between two clients is both inapplicable on its face and confusing when applied by analogy. *Id.* This rule was recently deleted from the Model Rules. Compare MODEL RULES OF PROF’L CONDUCT R. 2.2 (2001), with MODEL RULES OF PROF’L CONDUCT R. 2.1–2.3 (2002). As for arbitrators, they were only mentioned in Rule 1.12 along with former judges for conflicts purposes. See MODEL RULES OF PROF’L CONDUCT R. 1.12 (2001).

²² See, e.g., Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required?* 38 S. TEX. L. REV. 575, 604 (1997) [hereinafter *Good Faith*] (explaining the need for new, specific rules to counter the current, pervasive adversarial models); Maureen E. Laffin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 479, 499 (2000) (calling application of the Model Code and Model Rules to mediation “murky”); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers From the Adversary Conception of Lawyers’ Responsibilities*, 38 S. TEX. L. REV. 407, 410 (1997) [hereinafter *Ethics*] (“I do not believe any of the currently drafted rule systems . . . provide adequate guidance for modern ‘ethical’ dilemmas facing lawyers, parties, clients and neutrals in the wide variety of ADR processes.”); Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS 631, 637–38 (1997) [hereinafter *Silences*] (“[C]ommon ADR practices probably will not be adequately dealt with by the current rule configurations.”); Diane K. Vescovo et al., *Essay—Ethical Dilemmas in Mediation*, 31 U. MEM. L. REV. 59, 61 (2000) (noting Model Rules do not deal with ethical issues raised by mediators). But see Geoffrey C. Hazard, Jr., *Non-silences of Professor Hazard on “The Silences of the Restatement”: A Response to Professor Menkel-Meadow*, 10 GEO. J. LEGAL ETHICS 671, 673–74 (1997) (advocating adoption of a version of the Model Code of Judicial Conduct to cover third-party neutrals).

take up the slack by drafting their own stand-alone ethical guidelines.²³ Amazingly, it was not until last year that recognition of the most basic form of appropriate dispute resolution—use of a third-party neutral—found its way into the Model Rules. As a result of the work of the Ethics 2000 Commission,²⁴ the ABA formally amended the Model Rules in February 2002 to include specific reference to third-party neutrals.²⁵

In what has been called “the single most important” revision,²⁶ the preamble to the Model Rules now recognizes that, in addition to representational functions, lawyers may serve in nonrepresentational roles as third-party neutrals.²⁷ Additionally, a new Rule 2.4 was created specifically governing lawyers serving as third-party neutrals.²⁸ This new rule defines

²³ By 1996, there were at least 100 mediation codes of conduct. Feerick, *supra* note 21, at 315. There are also numerous codes of ethics for arbitration created by professional organizations and providers. See *infra* notes 36, 60–61 and accompanying text (discussing arbitration ethics codes). The guidance provided by mediation and arbitration ethical codes has been mixed. For example, the AAA/ABA’s Code of Ethics for Arbitrators in Commercial Disputes is widely used by both arbitrators and arbitral institutions. See John D. Feerick, *The 1977 Code of Ethics for Arbitrators: An Outside Perspective*, 18 GA. ST. U. L. REV. 907, 907 (2002). In contrast, the Ethical Standards of Professional Responsibility promulgated in 1986 by the now-defunct Society of Professionals in Dispute Resolution (“SPIDR”) has faded into oblivion. See Yarn, *supra* note 16, at 214. SPIDR has since merged into the Association for Conflict Resolution. See Association for Conflict Resolution, at <http://www.acresolution.org> (last visited Nov. 25, 2002).

²⁴ In 1997, the ABA Board of Governors appointed a thirteen-member Commission on Evaluation of the Model Rules of Professional Conduct. This commission is more commonly known as the Ethics 2000 Commission. The Ethics 2000 Commission was charged with reviewing the Model Rules and proposing revisions. After three years of work, the commission released its 400-page report in November 2000. A complete text of the Ethics 2000 report is available at www.abanet.org/cpr/ethics2k/html.

²⁵ The Ethics 2000 report with its proposed changes to the Model Rules was presented to the ABA House of Delegates at its August 2001 meeting. The House voted on some of the proposed rules. The House completed its deliberations at its February 2002 meeting. As of February 2002, the Model Rules have been amended to reflect the Ethics 2000 recommendations. However, the Model Rules retain their traditional title, with a new date—Model Rules of Professional Conduct (2002).

²⁶ Yarn, *supra* note 16, at 228.

²⁷ See MODEL RULES OF PROF’L CONDUCT pmbl. para. 3 (2002) (“In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter.”).

²⁸ MODEL RULES OF PROF’L CONDUCT R. 2.4 (2002).

third-party neutral²⁹ and imposes a duty on a third-party neutral to inform unrepresented parties that the lawyer is not representing them.³⁰ While other minor changes relating to ADR are sprinkled throughout the newly revised Model Rules,³¹ they are still a “model.” Individual jurisdictions must now determine which, if any, of the new provisions they will ultimately adopt.³²

The lesson of the struggle for third-party neutral inclusion into the Model Rules to collaborative lawyering is simple. Even the most basic recognition of the reconceptualization of lawyer roles away from the adversarial advocate to the nonrepresentational lawyer-neutral is taking a long time.³³ Indeed, there is still debate over whether lawyers acting as

²⁹ The new rule defines a third-party neutral as follows:

A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties resolve the matter.

MODEL RULES OF PROF'L CONDUCT R. 2.4(a) (2002).

³⁰ See MODEL RULES OF PROF'L CONDUCT R. 2.4(b) (2002). The comments to Rule 2.4 are more catch-all and include recognition that lawyer-neutrals may be subject to various codes of ethics, such as the AAA/ABA Code of Ethics for Arbitrators. *Id.* at cmt. 2. Additionally, the comments note that conflicts of interest are addressed in new Rule 1.12 and candor to the tribunal in new Rule 3.3. *Id.* at cmts. 4, 5.

³¹ For example, changes were also made to Rules 1.4, 1.12, 3.3 and 4.1. See *infra* notes 71 (describing changes to Rules 1.4 and 1.12), 108–14 and accompanying text (describing changes to Rules 3.3 and 4.1).

³² More than forty states are already reviewing or preparing to review their respective state rules in light of the 2002 changes to the Model Rules. Mark Hansen, *Smooth Sailing*, ABA J., Oct. 2002, at 69. Virginia, however, is ahead of the pack. It already has adopted specific rules relating to third-party neutrals and mediators. See VA. RULES OF PROF'L CONDUCT R. 2.10 (third-party neutrals), R. 2.11 (mediators) (2002).

³³ Clearly, there is widespread use of lawyers serving as third-party neutrals and the ethical rules regarding representational roles do not apply to their nonrepresentational ones. *Silences*, *supra* note 22, at 637–38. Recognition, however, remains slow. Consider the problem presented by the new Restatement of the Law Governing Lawyers released in 2000 by the American Law Institute. This two-volume work is a major piece of legal scholarship that goes well beyond the scope of either the Model Code or Model Rules. However, the Restatement fails to address issues relating to alternative dispute resolution, especially third-party neutrals. See *id.* at 638–39 (arguing that the Restatement fails to include any definition or conception of lawyers as arbitrators, mediators, early neutral evaluators, or representatives or advocates within these dispute resolution formats). But see Hazard, *supra* note 22, at 671 (contending that the Restatement is not silent, but speaks in more general terms). While there is some mention of ADR in the Restatement, it is generally limited to issues such as attorney-client fee disputes and malpractice.

neutrals are “practicing law” and thereby subject to lawyer ethical codes at all.³⁴ While the recognition of third-party neutrals in the Model Rules is a step in the right direction, even this falls short of expectations.³⁵ The stand-alone nature of new Rule 2.4, however, shows some willingness to embrace unique rules for ADR participants. With this context, it is not surprising to me that Lawrence and Beckwith/Slovin disagree on the need for ethical guidelines for the new collaborative lawyer.

Imagine a spectrum with a lawyer representing a client in litigation at one extreme and a judge presiding over the dispute at the other. There is no question that different ethical standards govern the litigator and the judge. Add a third-party neutral to the spectrum. The neutral would lie close to, if not on, the judicial end of the spectrum. Hence, it makes sense that ethical guidelines different from the advocate and more similar to the judge should control. Despite this conceptually easier application of the need for different ethical rules for neutrals, such recognition is still not universal. As we move farther in on the ethical spectrum, as with collaborative lawyering, resistance to new rules intensifies. The ethical treatment of party-appointed arbitrators, considered in the next section, illustrates this.

B. Domestic Arbitration and the Party-Appointed Problem

If the ethical orientation of third-party neutrals is the “easier” question, the ethical posture of the party-appointed arbitrator introduces a hard twist. Should party-appointed arbitrators be held to lesser ethical standards than their neutral colleagues? Currently, certain ethical codes for domestic

RESTATEMENT OF THE LAW GOVERNING LAWYERS §§ 42 cmt. b(iv) (“In many jurisdictions, fee-arbitration procedures entitle any client to obtain arbitration . . .”), 54 cmt. b (“A client and lawyer may agree in advance . . . to arbitrate claims for legal malpractice . . .”) (2000); see also *Silences*, *supra* note 22, at 647–48.

³⁴ See *New Wine*, *supra* note 15, at 940–41 (noting the continuing debate about whether lawyer-neutrals are practicing law and subject to the ethical considerations governing lawyers).

³⁵ See Robert F. Cochran Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L.J. 895, 906–09 (2001) (arguing Ethics 2000 changes to Model Rules fall short and undermine client influence over ADR decisions); Carrie Menkel-Meadow, *Ethics in ADR: The Many “Cs” of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L.J. 979, 984–87 (2001) [hereinafter *Many Cs*] (describing where Ethics 2000 falls short with respect to ADR); Yarn, *supra* note 16, at 260 (noting Ethics 2000 took a “very conservative approach” and “did little to promote ADR or change lawyer behavior”).

arbitration create dual ethical responsibilities for party-appointed arbitrators and third-party neutrals on tripartite panels.³⁶ The duality of these codes is simple; they impose the highest standards of impartiality and fairness on a neutral arbitrator while permitting predisposition toward the nominating party by a party-appointed arbitrator. Criticism of this “party-appointed problem” and the current moves to correct it further inform the discussion of collaborative lawyer ethics.

The widely used³⁷ AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes embodies this duality and squarely presents the party-appointed problem in that it requires that “persons who have the power to decide should observe fundamental standards of ethical conduct.”³⁸ To ensure broad public confidence, an arbitrator has a responsibility, not only to the parties but also to the process itself, to observe high standards of conduct preserving the integrity and fairness of the process.³⁹ This requires arbitrator independence and precludes predisposition.⁴⁰ However, these ethical obligations are diluted if one is a nonneutral party-appointed arbitrator.⁴¹ Nonneutrals “may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith with integrity and fairness.”⁴² While the nonneutral still must act in good faith and with integrity and fairness, the specific prohibitions of the Code of Ethics—delaying tactics, harassment of witnesses, or making knowingly untrue or

³⁶ See AAA/ABA, Code of Ethics for Arbitrators in Commercial Disputes Canon VII (1977) [hereinafter Code of Ethics] (creating exceptions from canons for nonneutral party-appointed arbitrators), 1998 WL 1527121, *available at* www.adr.org; JAMS, Ethics Guidelines for Arbitrators, Guideline X (2002) (creating exceptions from ethical guidelines for nonneutral arbitrators), *available at* http://www.jamsadr.com/ETHICS_for_arbs.asp.

³⁷ Feerick, *supra* note 23, at 907.

³⁸ Code of Ethics, *supra* note 36, at pmbl. para. 3.

³⁹ *Id.* at Canon I(A).

⁴⁰ See *id.* at Canon V(B) (“An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.”).

⁴¹ Technically, the Code of Ethics sets a series of canons applying to all arbitrators. Canon VII, entitled “Ethical Considerations Relating to Arbitrators Appointed by One Party,” then creates exceptions that apply to nonneutral party-appointed arbitrators. Significantly, the Code of Ethics establishes a presumption that party-appointed arbitrators are nonneutral. *Id.* at Canon VII Introductory Note.

⁴² *Id.* at Canon VII(A)(1); see *id.* at Canon VII(E)(1) (“Nonneutral arbitrators are permitted to be predisposed toward deciding in favor of the party who appointed them.”).

misleading statements—punctuate the difference in standards.⁴³ Thus, the Code of Ethics prescribes one form of treatment for the neutral and a different, lesser standard for the nonneutral party-appointed arbitrator.

This fundamentally different ethical treatment also manifests in different disclosure and ex parte communication requirements. Under the Code of Ethics, before accepting appointment, arbitrators should disclose: (1) direct or indirect financial or personal interest in the outcome of the arbitration and (2) any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or may reasonably create the appearance of bias.⁴⁴ In contrast, nonneutral party-appointed arbitrators essentially have a one time, general disclosure requirement. The disclosure “should be sufficient to describe the general nature and scope of any interest or relationship, but need not include as detailed information as is expected from persons appointed as neutral arbitrators.”⁴⁵ Significantly, nonneutral arbitrators are not obliged to withdraw if requested.⁴⁶

But the true “hallmark”⁴⁷ of the nonneutral party-appointed arbitrator is the ability to engage in ex parte communication. As a general rule, a neutral arbitrator should not discuss a case with any party in the absence of the others.⁴⁸ Nonneutral party-appointed arbitrators, however, may communicate with their nominating party about any part of the case provided they first

⁴³ *Id.* at Canon VII(A)(1). By specifically identifying and prohibiting these actions, but not more, the Code of Ethics appears to set this as the boundary for fairness and integrity as applied to the party-appointed arbitrator. See Deseriee A. Kennedy, *Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations*, 8 GEO. J. LEGAL ETHICS 749, 762–63 (1995).

⁴⁴ Code of Ethics, *supra* note 36, at Canon II(A). This includes disclosure of such relationships with any party, lawyer, or witness and extends to relationships involving members of their families or current employers, partners or business associates. *Id.*

⁴⁵ *Id.* at Canon VII(B)(1). The JAMS ethical guidelines do not require a nonneutral arbitrator to make any disclosure of actual or potential conflicts. See JAMS, Ethics Guidelines for Arbitrators, Guideline X (2002).

⁴⁶ Code of Ethics, *supra* note 36, at Canon VII(B)(2). In contrast, if requested to withdraw by one of the parties, the neutral arbitrator should do so, unless the parties’ agreement establishes procedures for challenges, or the arbitrator determines the challenge is not substantial. See *id.* at Canon II(E). Given this standard, it is not surprising that judicial inquiry into a neutral’s conduct often focuses on nondisclosure issues that might reveal impartiality; nonneutrals, who are expected to have relationships, rarely provide a basis to vacate an arbitral award. See Kennedy, *supra* note 43, at 763 (describing the difference in judicial inquiry into neutral and nonneutral conduct).

⁴⁷ Kennedy, *supra* note 43, at 764.

⁴⁸ Code of Ethics, *supra* note 36, at Canon III(B).

inform the other participants that they intend to engage in ex parte communication; content need not be disclosed.⁴⁹ This ability is considered by many participants as one of the key benefits of arbitration.⁵⁰

Proponents of this system of nonneutral party-appointed arbitrators contend that it has numerous benefits. It ensures that the party has a champion on the panel to serve as an effective advocate.⁵¹ It allows for selection of an arbitrator familiar with the industry and with relationships to it thereby increasing the expertise of the decision makers.⁵² Additionally, the very fact of party participation ensures greater support for both the process of arbitration and the result.⁵³

However, the nonneutral party-appointed arbitrator—unique to domestic arbitration⁵⁴—is under fire. Calling this system everything from “a stepsister of dubious integrity”⁵⁵ to an “embarrassment,”⁵⁶ critics argue that because a party-appointed arbitrator is less constrained by the ethical rules, the arbitrator is free to act less impartially, yielding a decision tainted by partiality.⁵⁷ Given that the arbitrator’s role is pivotal to the entire process and that commercial arbitration forms a significant part of our justice

⁴⁹ *Id.* at Canon VII(C)(2).

⁵⁰ See Kennedy, *supra* note 43, at 764.

⁵¹ See *id.* at 762 (describing advocacy as a reason for arbitrator choice); John P. McMahon, *The Role of Party-Appointed Arbitrators—The Sunkist Case*, 49 DISP. RESOL. J. 66, 66 (1994) (noting “that an attorney who does not choose an arbitrator who will champion the client’s case and prepare the arbitrator to do so is not fulfilling a duty to the client and that a party-appointed arbitrator who does not advocate the appointing party’s position is not doing his job.”).

⁵² See Kennedy, *supra* note 43, at 763 (describing proponents’ view that experience and relationships improve competency); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 435–36 (1988) (describing the advantages of expertise and knowledge).

⁵³ See Kennedy, *supra* note 43, at 759 (noting proponents argument that tripartite arbitrations provide even greater control than other forms of ADR); Stipanowich, *supra* note 52, at 437 (commenting that the party-appointed process may “stimulate greater faith in the process and lessen the chance of appeal”).

⁵⁴ See Stephen K. Huber, *The Role of Arbitrator: Conflicts of Interest*, 28 FORDHAM URB. L.J. 915, 925 (2001) (labeling the party-appointed arbitrator as “unique to American arbitration”).

⁵⁵ Robert H. Smit, *The Newly Revised CPR Rules for Non-Administered Arbitration of International Disputes*, 18 J. INT’L ARB. 59, 67 (2001).

⁵⁶ James H. Carter, *Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for “Nonneutrals,”* 11 AM. REV. INT’L ARB. 295, 305 (2000).

⁵⁷ See Kennedy, *supra* note 43, at 764 (“The Code of Ethics provides few barriers between the predisposed party-selected arbitrator and a decision tainted by partiality.”).

system, the highest standards of ethical conduct should be imposed on all arbitrators.⁵⁸ Judicial reluctance to reexamine arbitral awards based on party-appointed arbitrator conduct reinforces the need for the highest ethical standards.⁵⁹ The dual ethical approach is also criticized as inconsistent and incompatible with international arbitration rules. International arbitration rules uniformly reject two-tiered ethical burdens for party-appointed and neutral arbitrators.⁶⁰ Even the AAA's own International Arbitration Rules

⁵⁸ See *id.* at 768 (advocating higher ethical standards to ensure the integrity of the process).

⁵⁹ See *id.* at 768–87 (outlining the refusal of courts to intervene in the arbitral process). Consider *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815 (8th Cir. 2001). Following a tripartite arbitration under the Federal Arbitration Act (FAA), AFC Coal sought to vacate the arbitration award because a nonneutral party-appointed arbitrator had an on-going consulting relationship with Delta Mine and its attorneys, participated in pre-hearing preparation of Delta Mine's case, and had ex parte communications with Delta Mine's attorneys during deliberations. *Id.* at 819. The district court agreed and held that the nonneutral's conduct violated the Code of Ethics, justifying vacating the award under the FAA's "evident partiality" standard. *Id.* at 820. The Eighth Circuit reversed on the grounds that the arbitration agreement contemplated the selection of partial arbitrators and that disclosure of a "client consultant relationship" was sufficient. *Id.* at 820–22. *Delta Mine* illustrates a substantial judicial tolerance for partisan, party-appointed arbitrators. See also *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 756–59 (11th Cir. 1993) (finding that a nonneutral party-appointed arbitrator did not violate the Code of Ethics "good faith" standard where the arbitrator helped the party prepare its case and published views on issues involved in the dispute prior to the arbitration).

⁶⁰ See Carter, *supra* note 56, at 299 ("Prominent rules in international arbitrations provide expressly that all arbitrators, including those appointed by parties, must be impartial and independent.").

In 1986, nearly a decade after the joint AAA-ABA effort produced the Code of Ethics, the International Bar Association (IBA) adopted ethical guidelines. Int'l Bar Ass'n, *Ethics for Int'l Arbitrators* (1986), available at 26 I.L.M. 583 (1987). The IBA's ethical guidelines diverge from the Code of Ethics and take the approach that the same ethical standards should control all arbitrators, regardless of the appointment method. The IBA starts with a fundamental rule: "Arbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias." *Id.* at art. 1. The IBA requires disclosure of all facts or circumstances that may give rise to justifiable doubts as to a prospective arbitrator's impartiality or independence. *Id.* at art. 4.1. Regarding ex parte communications, the IBA requires that "an arbitrator should avoid any unilateral communications regarding the case with any party, or its representatives." *Id.* at art. 5.3.

Effective January 1998, the International Chamber of Commerce (ICC) established its set of arbitration rules. Int'l Chamber of Commerce, *Rules of Arbitration of the Int'l Chamber of Commerce* (1998), available at <http://www.iccwbo.org/court/english/>

reject the distinction.⁶¹ Consequently, the uniquely domestic dual approach should give way to a harmonized and higher ethical burden consistent with the international models.⁶²

Reformers may be getting their wish. Currently underway is a joint project involving the ABA, AAA, and CPR to revise the Code of Ethics and create a unified code applicable to both domestic and international

arbitration/rules.asp. These rules require that, “[e]very arbitrator must be and remain independent of the parties involved in the arbitration.” *Id.* at art. 7, § 1. To this end, all prospective arbitrators must sign a written statement of independence and disclosure and submit it to the Secretariat of the International Court of Arbitration (the ICC’s arbitration body) disclosing any facts or circumstances which might call into question the arbitrator’s independence in the eyes of the parties. *Id.* at art. 7, § 2. The Secretary General then confirms party-appointed arbitrators, provided they have filed a statement of independence without qualification or a qualified statement of independence that has not given rise to objections. *Id.* at art. 9, § 2. There are provisions to challenge an arbitrator for lack of independence with the ultimate decision resting with the Court. *Id.* at art. 11, §§ 1–3.

In 2000, the CPR Institute for Dispute Resolution (CPR) revised its Rules for Non-Administered Arbitration of international disputes. CPR Inst. for Disp. Resol., Rules for Non-Administered Arbitration (2000), *available at* <http://www.cpradr.org/arb-rules.htm>. These rules also require that “[e]ach arbitrator shall be independent and impartial.” *Id.* at R. 7.1. Arbitrators are required to disclose in writing “any circumstance that might give rise to justifiable doubt regarding the arbitrator’s independence.” *Id.* at R. 7.3. Provisions exist for challenge of all arbitrators for lack of independence or impartiality, with the ultimate decision by a neutral organization. *Id.* at R. 7.5–7.8. Ex parte communication is also prohibited, except general discussions about the controversy and a candidate’s qualifications, independence, or impartiality. *Id.* at R. 7.4.

⁶¹ The International Centre for Dispute Resolution, a division of the AAA, has issued its own arbitration rules. Int’l Centre for Dispute Resolution, Int’l Arbitration Rules (2001), *available at* www.adr.org. Unlike the domestic Code of Ethics, the International Arbitration Rules do not promote separate ethical standards for neutrals and party-appointed arbitrators. All arbitrators “shall be impartial and independent” and disclose any circumstance likely to give rise to justifiable doubts as to impartiality or independence. *Id.* at art. 7, § 1. Additionally, no party shall have ex parte communications with any arbitrator, or candidate for party-appointed arbitrator, except to advise of the general nature of the controversy, the anticipated proceedings, and discuss qualifications, availability, or independence. *Id.* at art. 7, § 2.

⁶² See Carter, *supra* note 56, at 305 (calling for a revised code of ethics that seeks consensus with the international codes by defining and limiting nonneutrals); Kennedy, *supra* note 43, at 787–90 (advocating reform of tripartite arbitration by requiring the highest ethical standards modeled after the Code of Judicial Conduct).

commercial arbitration.⁶³ Resolving the party-appointed problem is one of the major tasks of this reform effort.⁶⁴ Representatives of the three groups reached tentative agreement at the ABA's annual conference in August 2002.⁶⁵ The new guidelines, called the "Code of Ethics for Arbitrators in Domestic and International Commercial Disputes," are still a working draft and unfinalized.⁶⁶ While the most recent draft has not been publicly circulated, it reportedly includes the following: a "neutral presumption" that the default status of an arbitrator is one of neutrality, no ex parte communications absent consent of the other party, and required disclosures for "partisan"⁶⁷ arbitrators mirroring those of neutrals.⁶⁸

What does this mean for collaborative lawyering? In a parallel form of dispute resolution, a party representative is currently allowed and expected to be an advocate. The ethical problems raised by these standards, especially those concerning the process of arbitration, have been increasingly scrutinized and challenged. It now appears as if the domestic arbitration community itself is prepared to hold even party-appointed arbitrators to higher standards more in line with those widely recognized for neutrals.⁶⁹ There are, of course, differences, such as the long-standing ethical requirement that even nonneutral party-appointed arbitrators must decide disputes with good faith, fairness, and integrity.⁷⁰ However, the trend away from advocacy toward neutrality is instructive.

⁶³ See *Agreement Near on Code of Ethics for Commercial Arbitrators* (Aug. 14, 2002) (describing the status of the effort), at <http://www.adrworld.com/opendocument.asp?Doc=kRsJfSG0wC&code=Tzd6d8pk> [hereinafter *Agreement*].

⁶⁴ Feerick, *supra* note 23, at 909.

⁶⁵ *Agreement*, *supra* note 63.

⁶⁶ *Id.* Following finalization, it will then be circulated to interested ABA sections before forwarding it to the ABA House of Delegates next summer.

⁶⁷ See *id.* (reporting agreement to call nonneutral party-appointed arbitrators "partisan").

⁶⁸ See *id.* (reporting agreement on neutral presumption and no ex parte communication absent consent); Feerick, *supra* note 23, at 921 (noting working draft contains parallel disclosures for all arbitrators).

⁶⁹ The trend is certainly not universal. The newly revised Model Rule 1.12 retains a conflicts provision that "[a]n arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party." MODEL RULES OF PROF'L CONDUCT R. 1.12 (2002). This retention is another criticism of Ethics 2000. See *Many C's*, *supra* note 35, at 986 (criticizing the partisan arbitrator rule).

⁷⁰ See Code of Ethics, *supra* note 36, at Canon VII(A)(1). Interestingly, this may not be such a significant difference given collaborative law's good faith requirement. See Lawrence, *supra* note 1, at 436 (describing good faith discovery procedures with

C. Lawyer Representatives in Mediation

While there may be a trend toward reassessing the ethical standards applicable to party-appointed arbitrators and third-party neutrals (both arbitrators and mediators), what about party representatives in mediation? Even the newly revised Model Rules are silent as to ethical guidance for the lawyer representing a party in mediation.⁷¹ This silence, however, should not

collaborative law); Reynolds & Tennant, *supra* note 1, at 12 (noting that in collaborative law the parties agree to act in good faith).

⁷¹ See James Alfani, *E2K Leaves Mediation in an Ethics "Black Hole,"* DISP. RESOL. MAG., Spring 2001, at 3 [hereinafter *E2K*] (pointing out this "glaring deficiency" in Ethics 2000); *New Wine*, *supra* note 15, at 951 (noting the absence of modifications addressing the ADR representative lawyer in Ethics 2000). Aside from the recognition of third-party neutrals in the preamble and new Model Rule 2.4, discussed *supra* notes 26–30 and accompanying text, the only other changes relevant to mediation involve the duty to advise and conflicts. See MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.4, 1.12, 2.1 (2002).

Arguably, the new Model Rules slightly strengthen the duty to advise clients about ADR options. Three areas are relevant. First, Model Rule 1.2 concerning the allocation of authority between client and lawyer is amended to require a lawyer to "abide by a client's decisions concerning objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002). New Model Rule 1.4 relating to communication is completely redrafted to specifically outline a lawyer's duty to do the following: promptly inform of decisions or circumstances involving informed consent, consult about means, inform about the status of the matter, comply with requests for information, and consult about limitations on the lawyer's conduct. *Id.* at R. 1.4(a)(1)–(5). However, there is no specific reference to ADR. The lawyer's duty to "reasonably consult with the client about the means by which the client's objectives are to be accomplished" is the most likely source of an attorney's duty to inform concerning ADR options. *Id.* at R. 1.2(a). Finally, while Rule 2.1 remains unchanged, the comments include a new sentence: "Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." *Id.* at R. 2.1 cmt. 5. Taken as a whole, these changes may enhance the duty to advise. However, the changes have been challenged as "weak" due to the lack of specific guidance, weak use of language, and poor location. See Cochran, *supra* note 35, at 908–09 (describing weaknesses). *But cf.* Rogers & McEwen, *supra* note 16, at 862–63 (contending that the placement of an ethical duty to advise is less important than whether such a duty is even advisable).

Additionally, Model Rule 1.12 is amended to include mediators or other third-party neutrals to the preexisting former judge or arbitrator rule. MODEL RULES OF PROF'L CONDUCT R. 1.12(a) (2002). The gist of the rule remains the same—a lawyer who participated personally and substantially in a matter as a judge, arbitrator, or other third-party neutral shall not represent anyone in connection with the matter, absent informed

be taken as consensus that current ethical codes provide sufficient answers.⁷² To the contrary, as readers of this Journal already know, there is an emerging debate on the appropriate ethical behavior of lawyer-representatives in mediation and the need for ethical codes for lawyers to provide guidance.⁷³ These discussions further illuminate the Lawrence-Beckwith/Slovin colloquy.

In a 1999 issue of this Journal, Professor Jean Sternlight surveyed the literature of how attorneys represent clients in mediation.⁷⁴ She concluded that essentially two camps emerged: one arguing that advocacy has a limited role in mediation and the other arguing for active advocacy.⁷⁵ This division remains. There are those—such as Professor Carrie Menkel-Meadow and Professor Kimberlee Kovach—who lament the stranglehold the adversarial model has on lawyer ethics, criticize this ethic of zeal as incompatible with mediation, and call for new ethical rules to guide lawyer behavior.⁷⁶ Others

consent in writing from all parties. *Id.* The rule also places limitations on negotiation for employment and includes screening procedures. *Id.* at R. 1.12(b), (c).

⁷² State-adopted lawyer ethics codes are not the only source for ethical guidelines in mediation. The vast majority of states have also enacted legislation to afford confidentiality in mediation. 1 SARAH R. COLE, NANCY H. ROGERS, & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* § 9:1, at 9-3 (2d ed. 2001). However, in many jurisdictions legislatures have given little weight to the need and effect of increased confidentiality. *Id.* § 9:33, at 9-82. For a comprehensive examination of mediation confidentiality and its application to federal mediation, see Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239 (2002).

⁷³ See Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 278–90 (1999) (surveying the recent literature on the role of attorney advocacy in mediation); see also James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 265 (1999) [hereinafter *Settlement Ethics*] (noting the emerging literature on the role of lawyer-representatives in mediation).

⁷⁴ Sternlight, *supra* note 73.

⁷⁵ *Id.* at 276–90.

⁷⁶ See *Ethics*, *supra* note 22, at 426–29, 452–53 (discussing the inappropriateness of zealous advocacy for ADR representatives and suggesting development of a nonadversarial ethics code); Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 161–66 (1999) [hereinafter *Professionalism*] (describing the proliferation of new roles for lawyer-representatives in ADR and proposing a new, nonadversarial aspirational code); *New Wine*, *supra* note 15, at 951–53, 959–72 (describing the disconnect between the adversarial paradigm and mediation and advancing a separate, nonadversarial code of ethical considerations);

concur.⁷⁷ In contrast, there are advocacy advocates—such as former U.S. Magistrate John Cooley, Professor Geoffrey Hazard, and I would include Professor Sternlight—who contend that attorney advocacy is appropriate in mediation.⁷⁸ To be sure, there are significant subtleties and differences advanced by all of these contributors to this mediation ethics conversation. However, one point is plain: there are both proponents and critics of having adversarial ethics models applied to lawyer-representatives in mediation.

The positions advanced by Beckwith, Slovin, and Lawrence on collaborative lawyering reflect this broader debate. Beckwith and Slovin note as much: “[t]he collaborative format presents . . . the same ethical issues as do mediation and negotiation without a neutral.”⁷⁹ They are also correct that “a body of comment has developed recognizing the zeal of the lawyer in mediation.”⁸⁰ However, the implication that there is consensus on application of this zealous advocacy standard to lawyer-representatives in mediation, thereby resolving the question in the collaborative context, is wrong. Lawrence’s position that the collaborative lawyer’s ethical orientation should shift away from pure advocacy⁸¹ is entirely consistent with the position of those criticizing a zealous advocacy standard and calling

Kimberlee K. Kovach, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith*, DISP. RESOL. MAG., Winter 1997, at 9, 9–10 (noting the continued and inappropriate adversariness in mediation and calling for a new good faith requirement); *Good Faith*, *supra* note 22, at 604, 622–23 (denouncing the adversarial model’s use in mediation and detailing a recommended good faith requirement); *see also* COLE ET AL., *supra* note 72 (2d ed. Supp. 2001), § 4.11, at 3 (“Some commentators advocate adoption of ethical rules to guide lawyers’ behavior in mediation . . .”).

⁷⁷ *See E2K*, *supra* note 71, at 3 (finding mediation lying and gamesmanship “troubling” and calling for creation of a new ethics infrastructure); *Settlement Ethics*, *supra* note 73, at 266–70 (same).

⁷⁸ *See* John W. Cooley, *Mediator & Advocate Ethics*, DISP. RESOL. J., Feb. 2000, at 73, 75 (stating that in mediation a lawyer has an ethical duty of advocacy of the client’s interests and applying the ABA Model Rules of Professional Conduct relating to lawyer conduct in negotiations); Geoffrey C. Hazard, Jr., *When ADR Is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues*, 12 ALTERNATIVES TO HIGH COST LITIG. 147, 147 (1994) (contending that a lawyer acting on behalf of a party in mediation “has a role analogous to that of an advocate in litigation” and is governed by the Model Rules); Sternlight, *supra* note 73, at 291–97 (arguing that attorney advocacy is entirely consistent with mediation yet stressing that using certain zealous litigation tactics may be poor advocacy in the context of mediation).

⁷⁹ Beckwith & Slovin, *supra* note 6, at 503.

⁸⁰ *Id.*

⁸¹ Lawrence, *supra* note 1, at 442.

for new nonadversarial ethics standards for lawyer-representatives in mediation.⁸²

III. WHY NEW HATS ARE NECESSARY

The current trend to reevaluate the ethical standards applied to lawyers as ADR participants—such as, third-party neutrals, nonneutral arbitrators, and mediation party-representatives—provide context for the dialogue started by Lawrence and Beckwith/Slovin on the ethics of collaborative lawyering. While this conversation is just beginning, there are signs that point toward the merits of departing from the traditional, general ethical standards applicable to lawyers. Briefly consider the following.

A. *The Paradigm Shift*

Central to the process of collaborative law is a paradigm shift away from a traditional adversarial model to a problem-solving model.⁸³ The win-lose dynamic is replaced with essentially a team approach.⁸⁴ This shift is embodied in the collaborative lawyer's agreement to avoid litigation, engage in good faith questions and answers, and participate in four-way conferences.⁸⁵ These structural process changes are designed to encourage attorneys to work cooperatively and creatively while empowering clients to play an active role in resolving their own disputes.⁸⁶ Attorneys who succeed

⁸² See *supra* notes 76–77 and accompanying text.

⁸³ Reynolds & Tennant, *supra* note 1, at 12; see *New Wine*, *supra* note 15, at 975 (discussing the distinct differences between litigation and collaboration); Chip Rose, *Collaborative Concepts* (Mar. 2002) (noting that professionals have embraced the paradigm shift), at <http://www.mediate.com/collaborativelaw/editrose2.cfm> (last visited Nov. 21, 2002).

⁸⁴ See *New Wine*, *supra* note 15, at 975 (describing the team approach of problem solving with collaborative law); Laflin, *supra* note 22, at 480–81 (describing winner and loser characteristic of adversarial litigation).

⁸⁵ See Lawrence, *supra* note 1, at 433–36 (outlining components of collaborative law); see also Arnold, *supra* note 2; Arnold, *supra* note 11, at 383–89.

⁸⁶ See William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 401 (1999) (detailing the collaborative law process and noting that it “has been found to reduce both contentiousness and cost”); Lawrence, *supra* note 1, at 433–34 (explaining how collaborative law encourages attorney and client cooperation and legitimization of interests); Chip Rose, *Introduction to Collaborative Negotiating*, at <http://www.mediate.com/articles/rose3.cfm> (last visited Nov. 21, 2002) (describing collaborative law’s attention to the process and outcome needs of clients).

in collaborative law must make the mental shift from the inherently competitive adversarial approach to one focusing on the needs of the parties.⁸⁷

Ethical rules borrowed from the adversarial model—such as zealous advocacy—seem ill-suited to this paradigm shift. This is certainly the lesson in other ADR contexts. When a lawyer engages in the nonrepresentational role of a neutral, the Model Rules now recognize that different ethical rules should apply.⁸⁸ Even when the lawyer is selected as a party-representative, the trend in tripartite arbitration is to hold the party-appointed arbitrator to standards more akin to a neutral than those of a party advocate.⁸⁹ Additionally, the call for abandoning the ethics of advocacy as applied to lawyer mediation-participants and creating nonadversarial codes provides a close parallel to collaborative lawyering.⁹⁰ In fact, collaborative lawyering presents an even stronger case for its own nonadversarial ethics standards than mediation given the team orientation and “powerful problem-solving potential” at the core of collaborative law.⁹¹

To be sure, there are ways to shoehorn the process of collaborative law into traditional lawyer ethical codes. Lawrence himself recognizes that collaborative law’s goals of avoiding litigation, withdrawal if unsuccessful, and good faith questions and answers could exist under traditional codes given the right interpretation.⁹² Beckwith and Slovin note the same.⁹³ Other commentators similarly observe the potential coexistence with traditional ethics provisions.⁹⁴

⁸⁷ See Rose, *supra* note 86 (contending that a mental shift is necessary for success).

⁸⁸ MODEL RULES OF PROF’L CONDUCT pmbi. para. 3, R. 2.4 (2002); see *supra* notes 26–30 and accompanying text (discussing inclusion).

⁸⁹ See *supra* notes 63–68 and accompanying text (describing trend).

⁹⁰ See *supra* notes 76–77 and accompanying text (explaining the position of critics of adversarial ethics in mediation).

⁹¹ Pauline H. Tesler, *Collaborative Law: What It Is & Why Family Attorneys Need To Know About It*, at <http://www.collaborativefamilylawofutah.com/articles/whatandwhy.html> (last visited Nov. 21, 2002); see *Professionalism*, *supra* note 76, at 161 (noting that commentators suggest that different lawyer roles in collaborative law warrant separate rules).

⁹² See Lawrence, *supra* note 1, at 442–44.

⁹³ See Beckwith & Slovin, *supra* note 6, at 502.

⁹⁴ See Reynolds & Tennant, *supra* note 1, at 28 (discussing ethical considerations with collaborative law and applying the Massachusetts Rules of Professional Conduct); D. Todd Sholar, Note, *Collaborative Law—A Method for the Madness*, 23 MEM. ST. U. L. REV. 667, 675–80 (1993) (describing compatibility of collaborative law with the Model Code).

Even “zealous advocacy” could be interpreted to include collaborative law by determining that the client’s needs are best served by a collaborative, as opposed to adversarial, model.⁹⁵ This, however, seems unsatisfactory. It could be the notion of trying to equate cooperative problem solving with “zealotry” that is unsettling.⁹⁶ Maybe it is reluctance to anchor collaborative law to an ethical concept that is subject to such extreme interpretations including “hired gun,” “Rambo,” and “gladiator.”⁹⁷ Given the distinct paradigm shift, new clearer standards would provide superior guidance for the collaborative lawyer.

B. *The (Non)Duty of Candor*

The precise contours of what the ethical standards should be for collaborative lawyers are beyond the scope of this Comment. Beckwith and Slovin, however, identify the “appropriate level of candor” as the major ethical issue in collaborative law.⁹⁸ This is a fine starting point. They contend that the ethical issue is the same as presented in mediation or negotiation with the exception of collaborative lawyers’ agreement to provide good faith answers to good faith questions.⁹⁹ Therefore, collaborative lawyers should look to mediation and negotiation to determine the appropriate level of candor required.¹⁰⁰ This, however, is unhelpful. The Model Rules provide poor, if any, guidance as to the lawyer’s duty of candor in mediation.

⁹⁵ See Beckwith & Slovin, *supra* note 6, at 498; Reynolds & Tennant, *supra* note 1, at 28 (applying duty of zealous representation through interpretation); Rack, *supra* note 1, at 9 (noting concern over zealousness, but concluding that collaborative law is consistent if the client consents); Sholar, *supra* note 94, at 677–80 (interpreting and applying the Model Code’s zealous representation standard).

⁹⁶ See *New Wine*, *supra* note 15, at 950 (“This zealotry, however, has been exaggerated to the extent that some contend it gives rise to an unworkable view of the lawyer’s task.”).

⁹⁷ See Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 304 (1995) (describing the hired gun and Rambo analogies); *New Wine*, *supra* note 15, at 950 (noting Rambo approach); Tesler, *supra* note 91 (describing the gladiator model); see generally Sternlight, *supra* note 73, at 291–97 (examining different conceptualizations of advocacy in mediation).

⁹⁸ Beckwith & Slovin, *supra* note 6, at 501.

⁹⁹ *Id.* at 501–02.

¹⁰⁰ *Id.* at 503.

Lawyers lie.¹⁰¹ It is not just a few unethical ones at the margins, but “a permanent feature of advocacy.”¹⁰² This is especially true in negotiation where willingness to lie is “central to one’s effectiveness in negotiations.”¹⁰³ Why? Lies work, or at least that is the common perception.¹⁰⁴ Lying is so ingrained that we have developed an ethical discourse to support it.¹⁰⁵ Hence, “zealous advocacy” means to many lawyers an obligation to perform all lawful acts including those the lawyer might consider unethical.¹⁰⁶ In other words, “a lawyer is required to be disingenuous.”¹⁰⁷

What then is the guidance the Model Rules provide to curb this tendency? There is no specific rule governing mediation conduct. The provision generally referred to as instructive is Model Rule 4.1, “Truthfulness in Statements to Others.”¹⁰⁸ However, Model Rule 4.1 only prohibits false statements of fact.¹⁰⁹ As applied to negotiation, the comments have been used to support an exception for “puffery”—a euphemism for lying.¹¹⁰ Because this conduct is inconsistent with mediation principles,

¹⁰¹ See generally Gerald Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990) (advancing a comprehensive taxonomy for lawyer lying); Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990) (concluding based upon her study that lawyer deception of clients is pervasive).

¹⁰² Wetlaufer, *supra* note 101, at 1272.

¹⁰³ *Id.*

¹⁰⁴ See *id.* (contending “well-told lies are effective”); cf. Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002) (arguing that the effective hard-bargainer is a myth and reporting conclusions from her new empirical study showing that effectiveness ratings drop for unethical adversarial bargainers).

¹⁰⁵ Wetlaufer, *supra* note 101, at 1272, 1254–65; Jonathan R. Cohen, *When People are the Means: Negotiating With Respect*, 14 GEO. J. LEGAL ETHICS 739, 763–64 (2001) (noting lawyer denial and masking of manipulative conduct).

¹⁰⁶ See Wetlaufer, *supra* note 101, at 1255–57 (describing the argument that zealous representation permits lying).

¹⁰⁷ *Id.* (quoting H. EDWARDS & J. WHITE, PROBLEMS, READINGS, AND MATERIALS ON THE LAWYER AS NEGOTIATOR 378 (1977)).

¹⁰⁸ MODEL RULES OF PROF’L CONDUCT R. 4.1 (2002).

¹⁰⁹ *Id.* at R. 4.1(a).

¹¹⁰ See *id.* at R. 4.1 cmt. 2 (“Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.”); *E2K*, *supra* note 71, at 3 (“It thus opens the door for what some refer to ‘puffery,’ and others as lying, in negotiations.”); Cooley, *supra* note 78, at 75 (noting comments suggest puffing is permissible and noting the absence of a bright line distinguishing lying); Reed E. Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45,

ADR advocates sought revision in Ethics 2000 to require a duty of candor to mediators.¹¹¹ They received virtually nothing. While a true duty of candor was extended to arbitration in revised Rule 3.3, mediation was excluded.¹¹² Mediation proponents did get a word—"ordinarily"—to qualify the comment in Rule 4.1 on negotiation puffery.¹¹³ This is the "black hole"¹¹⁴ of ethical guidance now controlling candor in mediation.

When the Model Rules are consulted, no duty of candor exists in mediation. Collaborative lawyering, however, needs such an ethical infrastructure.¹¹⁵ This nonadversarial, consensus-building, problem-solving approach cries out for an explicit duty of candor.¹¹⁶ While the good faith provision might provide some relief, it is limited to questions and answers. Thus, the "major ethical issue relating to collaborative lawyering"¹¹⁷ cannot be adequately resolved by looking at current mediation or negotiation standards.

C. *Why Hats at All?*

Collaborative lawyering had its genesis in family law where practitioners became disgruntled with the adversarial nature of the practice and the belief that it did more harm than good for their clients.¹¹⁸ While collaborative law has expanded out of this field, it continues to attract those who

51 (1994) ("The codes are far less clear regarding the status of false statements made to opponents in negotiation including whether such statements count as lies at all.").

¹¹¹ See Bruce E. Meyerson, *Telling the Truth in Mediation: Mediator Owed Duty of Candor*, DISP. RESOL. MAG., Winter 1997, at 17 (advocating a duty of candor to mediators); *Settlement Ethics*, *supra* note 73, at 269–72 (proposing revision to Rule 4.1).

¹¹² See MODEL RULES OF PROF'L CONDUCT R. 1.0(m) (defining tribunal to include an arbitrator), R. 3.3 cmt. 1 (noting duty is owed to a tribunal) (2002); *see also* Yarn, *supra* note 16, at 255–56 (describing a proposal to include other ADR processes and noting ultimate rejection of the idea).

¹¹³ MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (2002).

¹¹⁴ *E2K*, *supra* note 71, at 3.

¹¹⁵ *Cf. id.* (stating there is a critical need to create an ethics infrastructure to support settlement culture).

¹¹⁶ See Arnold, *supra* note 2 (describing the process as collaboration on "all aspects of the dispute resolution, without secrets from each other"); *New Wine*, *supra* note 15, at 951–52 (arguing negotiation standard permitting deception should not be the standard in mediation given its different characteristics).

¹¹⁷ Beckwith & Slovin, *supra* note 6, at 501.

¹¹⁸ Reynolds & Tennant, *supra* note 1, at 27–28; Tesler, *supra* note 91.

fundamentally question the adversarial model and seek a cooperative way to solve problems.¹¹⁹ Given this, why are ethical rules necessary at all? It would seem that self-selection would ensure that only like-minded collaborators would choose this type of practice. If so, a collaborative lawyer could easily go without an ethical hat or ethically “bare-headed.”

While it is comforting to hold to the belief that all lawyers practicing collaborative lawyering follow a similar personal ethics, this is unrealistic. As Professor Menkel-Meadow laments, “[t]he romantic days of ADR appear to be over.”¹²⁰ The success of ADR led to expansion of its use. This, in turn, led ADR proponents, once content with flexibility and creativity, to call for ethics and standards.¹²¹ This broader ADR trend is now playing out in collaborative lawyering.

In only its second decade, collaborative law is predicted to “become mainstream in a significantly shorter period of time than it has taken for mediation.”¹²² This rapid expansion has led collaborative law proponents to call for uniform standards.¹²³ As more lawyers are exposed to collaborative lawyering, a new ethical code is needed to both guide lawyers’ behavior and help educate and train new professionals on the ethical principles underlying the process.¹²⁴ The educational function is especially important given the dramatic paradigm shift embraced by collaborative law. Thus, the best way to preserve collaborative law’s fundamental principles and prepare for future expansion is with development of its own ethical standards.¹²⁵

¹¹⁹ Rack, *supra* note 1, at 8.

¹²⁰ *Ethics*, *supra* note 22, at 408.

¹²¹ *See id.* (describing Menkel-Meadow’s conversion to the need for new rules).

¹²² Rose, *supra* note 83.

¹²³ *See id.* (stating that the best opportunity for success is with a “core of uniform processes and protocols”).

¹²⁴ *See New Wine*, *supra* note 15, at 953–54 (explaining effect of new rules on lawyer conduct). Dean Nancy Rapoport has set forth a helpful test for determining if new and distinct ethical rules are warranted in a specific area of legal practice. *See generally* Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45 (1998). The test includes a baseline assessment of whether there is a poor fit with general models of ethics, followed by “second order” questions including: (1) repeat players with novices, (2) jurisdictional layers, (3) ease of code enactment, and (4) benefits of a single code balanced by disadvantages of abandoning state regulation. *See id.* at 65–77. Applying the Rapoport test to mediation, Professor Kovach concludes that entry of new, inexperienced lawyers to the field justifies new and distinct rules. *See New Wine*, *supra* note 15, at 957–58.

¹²⁵ There are numerous questions unanswered by this call. Not only must there be determination of what ethical provisions are warranted, but also whether the separate standards should be subsumed into Model Rules or exist on a stand alone basis. *See New*

IV. CONCLUSION

The conversation about new ethical hats for new collaborative heads is just beginning. Lawrence, Beckwith and Slovin have done collaborative lawyering a favor by squarely joining the issue. Undoubtedly, others will weigh in. Placed in perspective, the ethical concerns present in collaborative lawyering are already playing out for third-party neutrals, party-appointed arbitrators, and mediation representatives. Much can be learned from these related areas. The process of acceptance of the nonrepresentational role of lawyers as a third-party neutral and ultimate incorporation of a separate ethical rule in the Model Rules lays the foundation: different ethical rules are necessary when lawyers function in different roles. Even when the role is still as a party representative, ethical rules approaching those of the neutral can be appropriate as the very recent trend in handling party-appointed arbitrators illustrates. If, as many contend, the adversarial zealous advocacy standard should not apply to lawyers acting as party representatives in mediation, collaborative lawyering presents an even more compelling case for rejection of the standard. Applying these lessons, collaborative lawyers can best ensure that the core ethical qualities of their discipline continue by promoting development of separate ethical rules. It is time to don a new hat.

Wine, *supra* note 15 at 960 (noting options). While transsubstantivity has advantages I have advocated elsewhere in the context of civil procedure, it appears in this context that one set of rules for all lawyers may be unworkable given the differences in roles and ethical burdens. See Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 622–23 (2002) (rejecting heightened pleading in part due to transsubstantivity advantages).